

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH GIBBS, No. C-13-0860 TEH (PR)

Plaintiff,

v.

CARSON, et al.,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTIONS FOR LEAVE TO FILE SECOND AMENDED COMPLAINT; GRANTING PLAINTIFF'S MOTION TO REINSTATE DEFENDANT ACOSTA; DENYING WITHOUT PREJUDICE DEFENDANTS' MOTIONS TO DISMISS; SERVING UNSERVED DEFENDANTS

(Doc. nos. 44, 81, 83, 87, 89)

On February 26, 2013, Plaintiff Kenneth Gibbs, an inmate at California State Prison-Sacramento (CSP-SAC), filed this civil rights action under 42 U.S.C. § 1983 raising twenty-three claims against forty defendants who worked at Pelican Bay State Prison (PBSP), where Plaintiff was formerly incarcerated. On April 24, 2013, the Court issued an Order dismissing the complaint with leave to amend and, on May 8, 2013, Plaintiff filed a first amended complaint (FAC).

On May 16, 2013, the Court ordered service of eight cognizable claims against twelve defendants. The claims found to be

1 cognizable were: (1) an Eighth Amendment claim for deliberate  
2 indifference to serious medical needs against Dental Assistant  
3 Tupman; (2) an Eighth Amendment claim for deliberate indifference to  
4 serious medical needs against Dr. Crinklaw and Dr. Malo-Clines;  
5 (3) a First Amendment retaliation claim against Lt. Diggle for  
6 issuing a Rules Violation Report (RVR) against Plaintiff; (4) a  
7 First Amendment retaliation claim against Warden Lewis and Capt.  
8 Wood for transferring Plaintiff in order to force him to withdraw an  
9 administrative appeal; (5) a First Amendment retaliation claim  
10 against Counselor Royal, Officer Milton, and Capt. Wood for placing  
11 Plaintiff on C status in retaliation for Plaintiff's filing  
12 administrative appeals; (6) a due process claim against Lt. Anthony  
13 for denying Plaintiff's right to a witness at a disciplinary  
14 hearing; (7) an Eighth Amendment claim against Sgt. Acosta and  
15 Officer Castellaw for cruel and unusual punishment for leaking  
16 information about Plaintiff to other inmates; and (8) an Eighth  
17 Amendment claim against Officer Evans for using excessive force  
18 against Plaintiff.

19 On July 22, 2013, the Court received a letter from  
20 Plaintiff stating that Sgt. Acosta did not use excessive force  
21 against him. The Court construed this as Plaintiff's motion to  
22 voluntarily dismiss the claims against Sgt. Acosta and, on August 1,  
23 2013, dismissed Sgt. Acosta from the action.

24 Plaintiff has filed two motions for leave to amend the  
25 complaint as well as a motion to reinstate Defendant Sgt. Acosta.  
26 Also before the Court are: a motion to dismiss filed by Defendants  
27 Evans, Royal, Lewis, Milton, Diggle, and Wood; and a separate motion  
28

1 to dismiss filed by Defendants Anthony, Castellaw, and Tupman.

2 I

3 Plaintiff seeks leave to file a second amended complaint  
4 (SAC) adding Dr. Thomas J. Martinelli as a defendant on his Eighth  
5 Amendment claim for deliberate indifference to serious medical  
6 needs. In his proposed SAC, Plaintiff alleges that on April 25,  
7 2008, Dr. Martinelli performed a colonoscopy on Plaintiff at Sutter  
8 Coast Hospital. Plaintiff further alleges that Dr. Martinelli used  
9 contaminated and unsanitary instruments during the procedure,  
10 causing Plaintiff to become infected with herpes. These claims,  
11 liberally construed, state a claim of deliberate indifference  
12 against Dr. Martinelli.

13 Plaintiff correctly points out he originally filed his  
14 claim against Dr. Martinelli in Case. No. C. 13-02529 TEH (PR).  
15 This Court found the claims duplicative of the claims asserted in  
16 the instant action and dismissed Case. No. C. 13-02529. The Court,  
17 however, specifically granted Plaintiff leave to file an SAC in the  
18 instant action to add Dr. Martinelli as a defendant. (See Case. No.  
19 C. 13-02529 TEH (PR) at Dkt. 6.) Accordingly, Plaintiff's proposed  
20 SAC is proper, and his pending motions for leave to file the SAC are  
21 GRANTED.<sup>1</sup>

22 Because the SAC does not add new claims or new defendants

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24 <sup>1</sup> In its June 20, 2013 Order dismissing Case No. C. 13-02529  
25 TEH (PR), the Court directed Plaintiff to file an SAC in this action  
26 within twenty-one days, i.e., by July 10, 2013. Plaintiff states that  
27 he attempted to file his SAC in July 2013, but that it was returned  
to him. There is no record of an SAC filed in July 2013. The Court  
will, however, accept as true Plaintiff's representation that he  
attempted to file a timely SAC.

1 other than Dr. Martinelli, the Court will not issue a new screening  
2 order. Rather, the action will proceed on the eight claims found  
3 cognizable in the Court's order of May 16, 2013 as well as the  
4 Eighth Amendment deliberate indifference claim against Dr.  
5 Martinelli, found cognizable herein.

6 II

7 Plaintiff has filed a motion to reinstate Defendant Sgt.  
8 Acosta in which Plaintiff clarifies that his July 22, 2013 letter  
9 was not intended as a voluntary dismissal of Defendant Acosta.  
10 Plaintiff states that his letter was intended to notify the Court of  
11 an error in the Court's May 6, 2013 Service Order. Specifically, in  
12 the body of the Order, the Court found that Plaintiff had stated a  
13 cognizable Eighth Amendment claim against Defendant Acosta for cruel  
14 and unusual punishment for leaking information about Plaintiff to  
15 other inmates. In the conclusion section of the Order, however, the  
16 Court incorrectly stated that the claim against Defendant Acosta was  
17 an Eighth Amendment excessive force claim.

18 Plaintiff is correct. Accordingly, Plaintiff's motion to  
19 reinstate Defendant Acosta is GRANTED. The Court VACATES its August  
20 1, 2013 Order dismissing Defendant Acosta from the action.  
21 Plaintiff's Eighth Amendment claim against Defendant Acosta for  
22 cruel and unusual punishment will proceed.<sup>2</sup>

23 III

24 Defendants Evans, Royal, Lewis, Milton, Diggle, and Wood

26 \_\_\_\_\_  
27 <sup>2</sup> The conclusion section of the Order also omitted the fact that  
the cruel and unusual punishment claim was cognizable against  
Defendant Castellaw in addition to Defendant Acosta.

1 have filed a motion to dismiss Plaintiff's FAC based on failure to  
2 exhaust administrative remedies and failure to file within the  
3 statute of limitations. Defendants Anthony, Castellaw, and Tupman  
4 have filed a separate motion to dismiss Plaintiff's FAC based on  
5 improper joinder of unrelated claims against different defendants.

6 As discussed above, the Court has granted Plaintiff leave  
7 to file a second amended complaint. Therefore, the SAC is now the  
8 operative pleading herein. Accordingly, defendants' motions to  
9 dismiss are DENIED without prejudice to filing a renewed motion or  
10 motions addressing the claims in the SAC.

11 In light of the Ninth Circuit's recent opinion in Albino  
12 v. Baca, No. 10-55702, slip op. 1, 4 (9th Cir. Apr. 3, 2014) (en  
13 banc), the parties are advised that "an unenumerated motion under  
14 Rule 12(b) is not the appropriate procedural device for pretrial  
15 determination of whether administrative remedies have been  
16 exhausted." If Defendants seek to renew their arguments regarding  
17 Plaintiff's purported failure to exhaust administrative remedies,  
18 they must do so by way of a motion for summary judgment. See id.

19 IV

20 For the foregoing reasons, the Court hereby orders as  
21 follows:

22 1. Plaintiff's motions for leave to file a second amended  
23 complaint are GRANTED. Docket. Nos. 83, 89. The Clerk shall file  
24 Plaintiff's SAC. (Dkt. 89-1.) The Clerk is further directed to add  
25 Dr. Thomas J. Martinelli as a defendant on the docket in this  
26 action.

27 2. Plaintiff's motion to reinstate Defendant Sgt. Acosta

1 is GRANTED. Docket No. 81. The Court's August 1, 2013 Order  
2 dismissing Defendant Acosta is VACATED.

3           3. Defendants' motions to dismiss are DENIED without  
4 prejudice. Docket Nos. 44, 87.

5           4. Defendant Martinelli has not been served.

6 Accordingly, the Clerk shall issue summons and the United States  
7 Marshal shall serve, without prepayment of fees, a copy of the SAC  
8 in this matter, a copy of the Court's May 16, 2013 Service Order,  
9 and a copy of this Order on Dr. Thomas J. Martinelli at Sutter Coast  
10 Hospital in Crescent City, California.

11           5. The Court also notes that Defendants Dr. Malo-Clines  
12 and Dr. Crinklaw remain unserved. On September 6, 2013, the PBSP  
13 Litigation Coordinator provided forwarding addresses for these two  
14 Defendants. (See Dkt. 41.) Accordingly, the Clerk shall re-issue  
15 summons and the United States Marshal shall serve, without  
16 prepayment of fees, a copy of the SAC in this matter, a copy of the  
17 Court's May 16, 2013 Service Order, and a copy of this Order upon  
18 said Defendants at:

19           Dr. Malo-Clines  
20           PO Box 7289  
21           516 Redwood Street  
22           Brookings, OR 97415

23           Dr. Crinklaw  
24           1485 W. Frontier Street  
25           Apache Junction, AZ 85220

26           Counsel for Defendants is directed to inform the Court no  
27 later than thirty (30) days from the date of this order whether she  
28 will also represent Defendants Martinelli, Malo-Clines, and  
Crinklaw.

1           6. In order to expedite the resolution of this case, the  
2 Court orders as follows:

3           a. No later than sixty-three (63) days from the  
4 date this order is filed, Defendants must file and serve a motion  
5 for summary judgment or other dispositive motion. A motion for  
6 summary judgment also must be accompanied by a Rand notice so that  
7 Plaintiff will have fair, timely, and adequate notice of what is  
8 required of him in order to oppose the motion. Woods v. Carey, 684  
9 F.3d 934, 939 (9th Cir. 2012) (notice requirement set out in Rand v.  
10 Rowland, 154 F.3d 952 (9th Cir. 1998), must be served concurrently  
11 with motion for summary judgment). If Defendants renew their  
12 argument that Plaintiff failed to exhaust administrative remedies,  
13 Defendants should also incorporate a modified Wyatt notice in light  
14 of Albino. See Wyatt v. Terhune, 315 F.3d 1108, 1120, n.14 (9th  
15 Cir. 2003); Stratton v. Buck, 697 F.3d 1004, 1008 (9th Cir. 2012).

16           b. Plaintiff's opposition to the summary judgment  
17 or other dispositive motion must be filed with the Court and served  
18 upon Defendants no later than thirty-five (35) days from the date  
19 the motion is filed.

20           c. Defendants shall file a reply brief no later  
21 than fourteen (14) days after the date the opposition is filed. The  
22 motion shall be deemed submitted as of the date the reply brief is  
23 due. No hearing will be held on the motion.

24           7. Any motion for an extension of time must be filed no  
25 later than the deadline sought to be extended and must be  
26 accompanied by a showing of good cause.

27           8. Pursuant to the Court's Orders of April 24, 2013 and

1 May 16, 2013, the Clerk shall terminate the following Defendants  
2 from this action: Carson, Huges, M. Davis, Arcuri, Rush, P. Butter,  
3 Gonzales, F. Andrade, D. Davis, D. Forkner, D. McDonald, C.  
4 Rippetoe, A. Schavone, J. Whitlaw, G. Pope, J. Clemons, V. Ryan, F.  
5 Flowers, C. Ducart, Turner, J. Barneburs, D. James, K. Osborne,  
6 Pepiot, K, Cruse, Feimer, and Hilton.

7           9. Finally, the Clerk is directed to correct the spelling  
8 of the name of Defendant Tupman on the docket by substituting  
9 "Tupman" for "Tubman."

10           This Order terminates docket numbers 44, 81, 83, 87, and  
11 89.

12           IT IS SO ORDERED.

15 DATED      05/13/2014



16           THELTON E. HENDERSON  
17 United States District Judge

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